IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

FRITZ CONTZEN,
APPELLANT,

v.

THE UNITED STATES AND THE APACHE INDIANS.

No. 84.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

STATEMENT.

Appellant's petition avers that he was a citizen of the United States in October, 1861, when a band of Apache Indians raided the settlement at San Xavier, near Tucson, Arizona Territory, and near where he then resided, and stole from petitioner's ranch certain cows, horses and mules of the value of $10,330, wherefor he prayed judgment. The United States plead in bar that claimant was not at the date of the depredation a citizen of the United States,

and sustaining this plea the Court of Claims has dismissed the petition for want of jurisdiction.

The agreed statement of facts, adopted by the Court below as its finding of facts, is as follows (R. 3):

"The claimant, Fritz Contzen, was born in Germany, "on the 27th day of February, 1831, and emigrated to "Texas in July, 1845. He remained in Texas until the "admission of the State into the Union, December 29, "1845.

"Since the admission of Texas, the claimant has resided "continuously in the United States, mostly in Arizona "and some time in California. He visited Germany with "his wife and child from 1873 to 1880, his home and fur-"niture remaining all the time in this country. He was "married in the United States. His residence was in "Texas until he came to Arizona, in 1855, with Major "Emory, on the boundary commission.

"In the year 1854 he went into court at San Antonio, "Texas, and he was told that he being a resident of Texas "when it became part of the United States, that made "him a citizen of the United States, and he voted there. "He never took any further steps about naturalization. "There is no record of naturalization from 1847 on of any "one of the claimant's name, when such record should "appear in the courts of San Antonio.

"That in October, 1861, the defendant Indians were in "amity with the United States."

Assignment of Errors.

1. In holding that appellant was not a citizen of the United States.

2. And in dismissing appellant's petition.

ARGUMENT.

I.

The record discloses a case of extreme hardship. Appellant has spent nearly all his life in the United States; has rested, since 1854, secure in the advice and conviction that he was a naturalized citizen thereof; has exercised the right of suffrage as such, and is now nearly seventy years old. The facts herein bear close analogy to those disclosed in *Boyd* v. *Thayer* (143 U. S. 135), where the Court observed (p. 179):

"The policy which sought the development of the "country by inviting to participation in all the rights, "privileges, and immunities of citizenship, those who "would engage in the labors and endure the trials of "frontier life, which has so vastly contributed to the "unexampled progress of the nation, justifies the appli- "cation of a liberal rather than a technical rule in the "solution of the question before us."

And, again (p. 169), the Court quotes with approval the language of the House Committee on Elections in the case of David Levy that—

"no principle has been more repeatedly announced by "the judicial tribunals of the country and more con- "stantly acted upon than that the leaning, in questions "of citizenship, should always be in favor of the claimant "of it. * * *"

II

In *Boyd* v. *Thayer* (*supra*) reasoning both on principle and authority, the Court further observes (p. 170):

"Congress having the power to deal with the people of "the Territories in view of the future States to be formed

" from them, there can be no doubt that in the admission
" of a State a collective naturalization may be effected in
" accordance with the intention of Congress and the
" people applying for admission.

"Admission on an equal footing with the original States
" in all respects whatever, involves equality of constitu-
" tional right and power, which cannot thereafterwards
" be controlled, and it also involves the adoption as citi-
" zens of the United States of those whom Congress
" makes members of the political community, and who
" are recognized as such in the formation of the new State
" with the consent of Congress."

These conclusions have equal application with respect to the admission of the Republic of Texas into the union of the States. The political *status* of an inhabitant in the former, and the legal effect thereon of his absorption into the United States and as a member of the community then residing in Texas at the date of the annexation thereof, are questions to be determined (1) in the light of precedents (2) guided by the liberal rule declared *supra*.

The Joint Resolution of March 1, 1845 (5 Stats., p. 798), declares the consent of Congress that the territory of the Republic of Texas " may be erected into a new State, to
" be called the State of Texas, with a Republican form of
" government, to be adopted by the PEOPLE of said Repub-
" lic by deputies in convention assembled, with the con-
" sent of the existing government, in order that the same
" may be admitted as one of the States of this Union."

The Congress of the Republic of Texas on July 4, 1845, declared :

" That the government of Texas doth consent that the
" *people* and territory of the Republic of Texas may be
" erected into a new State, to be called the State of Texas,
" with a Republican form of government to be adopted by
" the *people* of said Republic," etc.

Thereunder a Constitution was framed, and on October 13, 1845, ratified by popular vote, whereupon, on December 29, 1845 (9 Stats., p. 108), Congress adopted the Joint Resolution, which by way of preamble recited the acts of the *people* of Texas *supra*, and declared the admission of Texas as a State "on an equal footing with the original "States in all respects whatever."

When thus admitted appellant was residing in Texas and had been since the preceding July. As the findings, *supra*, recite:

"In the year 1854, he went into court at San Antonio, "Texas, and he was told that he being a resident of "Texas when it became a part of the United States, that "made him a citizen of the United States, *and he voted* "*there.*"

On this judicial assurance appellant has rested secure, until forty-four years thereafter (1898) when the court below rules *contra* declaring (Op. Rec. p. 4), that on the admission of Texas "he was on that date physically an "inhabitant of the State, but he was not a citizen of the "State."

This, we submit, is the application of a technical rather than a liberal rule, and the exact converse of this Court's humane declaration in *Boyd* v. *Thayer*, *supra*.

Nor does it otherwise stand fair judicial test. It was the people of Texas who were admitted into the Union of the States. The enabling and admission acts use the word "people," not the word "citizens." The word "people" is synonymous with the word "inhabitants." Defining the latter word in this connection, the Court, in *Desbois's Case* (2 Martin, 185) (quoted with approval in *Boyd* v. *Thayer*, *supra*), said:

"The word 'inhabitants' in the first section of this Act "(forming Louisiana) must be taken *lato sensu*; it can- "not be restrained so as to include citizens of the United "States only, for other persons are afterwards called upon "to vote. There is not any treaty, or other instrument, "which may be said to control it. *Every attempt to "restrict it must proceed on principles absolutely arbi- "trary.*"

In *American Insurance Co.* v. *Carter* (1 Pet. 511, 542), construing the word "inhabitants" in the treaty whereby we acquired Florida, the Court, speaking by Chief Justice Marshall, said:

"This treaty is the law of the land, and admits the "inhabitants of Florida to the enjoyment of the privileges, "rights, and immunities of the citizens of the United "States. It is unnecessary to inquire whether this is not "their condition, independent of stipulation. They do "not, however, participate in political power; they do "not share in the government until Florida shall become "a State."

Webster's Dictionary defines the word "People" thus:

"The body of persons who compose a community, tribe, "nation or race; an aggregate of individuals forming to- "gether a whole."

So in *Quinby* v. *Duneau* (4 Harr. (Del.) 383) it was held that "citizens" and "inhabitants" do not mean the same thing, as a man may be a citizen without being an inhabitant of a State or an inhabitant without being a citizen.

Tested by the same principle, the word "people" of the Republic of Texas, cannot be restricted to mean only "citizens" thereof. The former is of far broader significance. The "people" of Texas were about to be absorbed

into the Federal Union. Many were *not* citizens—for people of the African race and of even remote consanguinity were excluded from citizenship by the Constitution of Texas. They became citizens of the United States many years later by the Fourteenth Amendment. When Texas was admitted, appellant—a mere boy—was one of the community—the "people" of Texas. He came with the "people" into the Union. When he reached majority he sought to make certain his political status and was judicially advised that because he was a "resi-"dent" of Texas when that State was admitted "*that* "made him a citizen of the United States, *and he voted* "*there.*"

Whilst voting is *prima facie* evidence only of citizenship, we submit his acts *then and since* made a continuing declaration of appellant's intention to be and remain a citizen of the United States. That continuing declaration stands without a flaw. For some fifty-six years he has given constant demonstration of his belief and intention. To deny him now such political status under the circumstances disclosed by this record is to apply a harsh and technical rule rather than a liberal one, which under closely analogous facts this Court applied in *Boyd* v. *Thayer supra*, and to ignore the approved doctrine "that the "leaning, in questions of citizenship should always be in "favor of the claimant."

III.

In this relation of citizenship there are some principles which are imbedded in American jurisprudence, and which have been announced by the courts or may be deduced from their decisions which are to-day universally accepted. Among these are the following:

First. That every freeman has the *right of election* of citizenship (nationality). *Inglis* v. *Sailor's Snug Harbor* (3 Pet. 122) and cases cited; *McIlvaine's Lessee* v. *Cox* (4 Cranch, 212); *Boyd* v. *Nebraska, supra.* Legislative and Executive Declarations are to the same effect. Rev. Stats. U. S., sec. 1999, p. 351; Secretary of State Marcy, in the Koszta case (Wharton, Int. Law, vol. II, secs. 175, 198).

Opinions of Attorney General U. S., Vol. 9, p. 356.

The time, circumstance, and conditions under which this election should be manifested, are necessarily regulated by the laws and practice of the adopting, incorporating State; and the sufficiency of the proof of such election must be determined by reference to the implicated facts in each case as it arises.

Second. That the leaning in questions of citizenship (nationality) should always be in favor of the claimant of it.

Boyd v. *Nebraska, supra,* citing Yulee's Case, Contested Elections, 1834, 1835, 2d Session, 35th Congress.

Legislative Declaration asserting the right of expatriation, Rev. Stats. U. S., sec. 1999, p. 351.

Third. That upon the acquisition, cession, incorporation of a heretofore independent State into the American Union, the inhabitants—the people of such State—unless specially excluded or excepted by the terms of the treaty of cession or joint resolution of annexation, become *ipso facto* citizens (nationals) of the nation incoporating such State.

Boyd v. *Nebraska, supra,* citing with approval *Desbois' Case,* 2 Martin (Louisiana) p. 185, and *Laverty's Case,* 3 Martin (Louisiana) 735; *Story,* The Constitution, II, p. 654, 4th ed., note by Cooley.

This method of changing the citizenship (nationality) of inhabitants of acquired or annexed territory is termed "collective naturalization;" and the political history of the United States and other States furnish numerous instances of its operation.

Phillimore, Int. Law, p. 382; 2 *Gunther*, p. 268, note (e); *U. S.* v. *Ritchie*, 17 Howard, p. 541; *Paschall, Ann't's Constitution U. S.*, pp. 222–225; *Am. Ins. Co.* v. *Canter*, 1 Pet. 542, 543; *Sabariego* v. *McKinney*, 18 How. 263; 6 U. S. States L., Art. 3, p. 202; 10 Stats L., Art. 5, 1035.

Fourth. That under the American system, citizens (nationals) *lato sensu*, are naturally and usually divided into two general classes: (1) all the inhabitants (people) resident in the country, who are secured by the public, natural or fundamental law, the enjoyment of civil, personal and property rights; (2) a limited and privileged number, who, from reasons or motives of State policy or expediency, are clothed with political power, and exercise the elective franchise.

Scott v. Sandford, 19 Howard, and cases cited; *Miner* v. *Happersett*, 21 Wall. 162–8, and cases cited; *Murphy* v. *Ramsey*, 114 U. S. and cases cited, 15, 47.

The "protective rights" are secured to the first class as fully as the second.

"In so far as there is any analogy between Roman and "American citizenship, it is strictly applicable to us. "* * * It establishes the great *protective* rights of the "citizen, but, like our own National Constitution, it is "silent about his *powers*. It protected Paul against "oppression and outrage, but said nothing about his right "of suffrage or his eligibility to office."

Opinions of Attorneys-General, Vol. X, pp. 393–394.

Fifth. That the perpetual inhabitants (of a State) are

those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united and subject to the society without participating in all its advantages.

Marshall, C. J., in *The Venus*, 8 Cranch 290, citing Vattell.

If these principles are sound and are applied to the state of facts appearing in this record, the appellant was a citizen of the United States at the time of the depredations complained of, is presently a citizen of the United States, and as such citizen has standing in Court under the provisions of the Act of Congress of March 3, 1891.

IV.

The emigration of appellant from Germany to the Republic of Texas, where he established a permanent residence (domicile), conclusively establishes the fact of his abandonment of his native land for the land of his adoption.

" If it sufficiently appear that the intention of removing " was to make a permanent settlement, or for an indefinite " time, the right of domicile is acquired by a residence of " a few days." *The Venus* (8 Cranch, 278, 279); *Story, Conflict of Laws*, sec. 44, citing authorities; Wharton, Int. Law, II, sec. 198 *et seq; Kosciusko's case* (14 Howard, 400); *Mitchell* v. *U. S.* (21 Wall. 350).

If there was any doubt as to the intention of appellant in this regard, it is entirely removed by the circumstance that he went into the Texas Court with a view to be naturalized as a citizen of the United States, and was there informed by the constituted officials that such act was not necessary, as his residence in Texas at the time of its ad-

mission into the Union as a State in 1845, made him a citizen of the United States, and qualified him as a voter in the State if the other requisites for suffrage were satisfied. Upon this representation appellant voted. It results that appellant had not only long been a constituent member of the political community of Texas and of the United States, but was further one of that limited and privileged class enjoying the elective franchise. While it is true that the exercise of the elective franchise in purely State elections is not a conclusive test of American citizenship, it may be *prima facie* evidence of citizenship. In this case the facts are broad enough to indulge the presumption that appellant voted at both State and Federal elections.

In the State of Texas illegal voting is punished with fine and imprisonment. Pascall's Digest of the Laws of Texas, Arts. 1895, 1898, p. 419.

In the absence of proof to the contrary or strong incriminating circumstances, the Court will not presume that appellant has been guilty of felony. On the contrary, *omnia rite acta præsumuntur.*

V.

The joint resolution operating upon the Texas domicile of appellant made him a citizen of the United States as of the date of annexation.

March 1, 1845, 5 Stats. L., p. 797; December 29, 1845, 9 Stats. L., p. 108.

The contention here made on behalf of appellees is the same as was made in 1812 and in 1813, in the U. S. District Court for the District of Louisiana, and in the Supreme Court of Louisiana in Laverty's and Desbois's cases.

In those cases the attempt was made to fasten the bar of common-law alienage—which is foreign to American policy and practice—upon claimants to citizenship of the United States under circumstances similar to those in this case; but the contention was unsuccessful; and the reasoning and conclusions of these courts has recently been approved by this Court. Boyd *v.* Nebraska (*supra*).

The Act of March 3, 1891 (26 Stats L. 851, chap. 538), under provisions of which this action is brought, is remedial; and as such should not receive a narrow or strained interpretation.

Northwestern Ex. Co. v. *U. S.*, 164 U. S. 686, *et seq.*

It is as a member of the State that the individual becomes of consideration; and it is as such member that rights as also duties attach to him in his national character at home and in foreign territory. It is in this relation that the State has a special interest and concern in him; and its obligation to protect and his duty to render service is reciprocal. And it is a narrow and misleading view to attempt to exclude this State interest when discussing the relations, rights and duties of the individual.

When the claim of a particular individual to citizenship is denied, two things result: the individual is deprived of State membership and the protection incident thereto; and the State surrenders its claim to the allegiance of the particular individual.

Among the circumstances usually relied on to establish the *animus manendi* are: declarations of the party, the exercise of political rights, the payment of personal taxes, a house residence, and a place of business. *Phill. Int. Law*, 100; *Wharton* I, sec. 62, and post; *Mitchell* v. *U. S.*, 22 Wall. p. 138. All these *indicia* appear in the case of appellant.

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In conclusion, it is submitted, *First*, that appellant became a citizen of the United States as a result of the admission of Texas and its people into the American Union, appellant not being among the excepted or excluded classes; *Second*. That at the date of the depredations committed upon his property in October, 1861, he was a citizen of the United States; *Third*. That at the date of the filing of his petition he was a citizen of the United States; and, *Fourth*, that as such citizen the Court has jurisdiction of his claim under provisions of the act of Congress March 3, 1891. Appellant therefore prays that the judgment of the Court of Claims be reversed, with instructions to that Court to entertain the claim.

Respectfully submitted.

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